INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	2
Statement	2
Argument	9
Conclusion	15

CITATIONS

Cases:

Citizens Environmental Council v. *Volpe*, 484 F.2d 870, certiorari denied, 416 U.S. 936 11

Coleman v. *Conservation Society of Southern Vermont*, petition for a writ of certiorari pending, No. 74-1413 11

Greene County Planning Board v. *Federal Power Commission*, 455 F. 2d 412, certiorari denied, 409 U.S. 849 11

Iowa Citizens for Environmental Quality, Inc. v. *Volpe*, 487 F.2d 849 11

Life of the Land v. *Brinegar*, 485 F.2d 460, certiorari denied, 416 U.S. 961 ..... 9, 10, 11

National Resources Defense Council, Inc., v. *Morton*, 458 F. 2d 827 ..... 9, 10

Scenic Hudson Preservation Conference v. *Federal Power Commission*, 354 F.2d 608, certiorari denied, 384 U.S. 941 10

Silva v. *Lynn*, 482 F.2d 1282 12

Udall v. *Federal Power Commission*, 387 U.S. 428 10

Statutes and regulations:

Administrative Procedure Act, 5 U.S.C. 706(2)(A) 2

Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, 33 U.S.C. (Supp. III) 1251 *et seq* 5

577—880—75——1

Statutes and regulations—Continued Page

National Environmental Policy Act of 1969, 83 Stat. 852–854, 42 U.S.C. 4321–4335 ..... 2, 7
Secs. 4321–4335 ..... 2, 7
Sec. 4332(2)(C)(iii) 9
Sec. 4332(2)(D) 9
Urban Growth and New Community Development Act of 1970, 84 Stat. 1791–1804, 42 U.S.C. 4501–4532 ..... 2, 3
Secs. 4501–4532 ..... 3, 8
Sec. 4513 13
Sec. 4514 ..... 3, 13
Sec. 4524 10
Sec. 4532 3
40 U.S.C. 461 14
Environmental Protection Agency Regulations, 40 C.F.R. 6.21(c) 11
40 C.F.R. 1500.7(c) 11

Miscellaneous:
236 Fed. Reg. 14212–14213 (1971) 13
HUD Reg. 32.7(a)(4), 36 Fed. Reg. 14207 (1971) 14
HUD Reg. 32.7(f)(1), 36 Fed. Reg. 14208 (1971) 14

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74–1310

EDWARDS UNDERGROUND WATER DISTRICT, ET AL., PETITIONERS

v.

CARLA A. HILLS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET. AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1–A46 [1]) is reported at 502 F. 2d 43. The opinion of the district court (Pet. App. A48–A89) is reported at 364 F. Supp. 834.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 1974. A timely petition for rehearing

[1] "Pet." refers to the petition for a writ of certiorari. "Tr." refers to the transcript of the proceeding in the district court.

was denied on November 19, 1974 (Pet. App. A47). Mr. Justice Powell, by order dated February 5, 1975, extended the time for filing a petition for a writ of certiorari to April 18, 1975. The petition was filed on that date.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the Secretary of Housing and Urban Development complied with the National Environmental Policy Act of 1969, Pub. L. 91–190, 83 Stat. 852–854, 42 U.S.C. 4321–4335.

2. Whether the court of appeals correctly held that the decision of the Secretary of Housing and Urban Development to afford financial assistance to a proposed development pursuant to the Urban Growth and New Community Development Act of 1970, Pub. L. 91–609, 84 Stat. 1791–1804, 42 U.S.C. 4501–4532, was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" within the meaning of the Administrative Procedure Act, 5 U.S.C. 706(2)(A).

STATUTES AND REGULATIONS INVOLVED

The relevant statutes, regulations and proposed regulations are set forth in the appendix to the petition for a writ of certiorari.

STATEMENT

In November 1970, San Antonio Ranch, Ltd. ("Developer") submitted a formal application to the Office of New Community Development, Department of

Housing and Urban Development ("HUD"),[2] for a HUD financing guarantee under Title VII of the Urban Growth and New Community Development Act of 1970, Pub. L. 91-609, 84 Stat. 1791-1804, 42 U.S.C. 4501-4532, to develop San Antonio Ranch New Town ("New Town") (Pet. App. A12; Tr. 1522). The Developer planned to construct the New Town on what was then predominantly virgin Texas hill country in the northwest quadrant of Bexar County, Texas, near the town of San Antonio, the South Texas Medical Center, the University of Texas at San Antonio, and the San Antonio International Airport (Pet. App. A9-A10).

A citizens group expressed concern to HUD about the possible damage the development might cause to the Edwards Aquifer, an underground reservoir that constitutes the water supply for the City of San Antonio and its environs, due to the fact that approximately 0.5% of the aquifer's annual water source originates from the site of the proposed New Town (Pet. App. A64).[3]

[2] Pursuant to the Urban Growth and New Community Development Act, 42 U.S.C. 4501-4532, the Secretary of HUD is authorized to guarantee and enter into commitments to guarantee the obligations of private entities that desire to establish and implement new community development programs. 42 U.S.C. 4514. The functions of the Secretary with respect to the Act are administered through the Community Development Corporation, which is established by the Act within HUD. 42 U.S.C. 4532.

[3] The water in the aquifer comes from three major sources: streams which flow across fractures and joints in rocks; underflow from another area of the underground reservoir; and, less importantly, rainfall (Pet. App. A11-A12). The New Town site is not located upon any major point at which water seeps down to the reservoir (Pet. App. A64).

As a result of this concern, HUD asked the Developer to retain a geologist-hydrologist to examine the project (Pet. App. A12). In addition, HUD obtained the comments of the Alamo Area Council of Governments, a regional multi-governmental planning organization composed of 16 representatives of the Edwards Water District, Bexar County and the 11 surrounding counties, which had conducted a review of the project (Pet. App. A12–A13). Additional comments were obtained from the Texas Water Quality Board and from San Antonio city officials (Pet. App. A13). Finally, an interdisciplinary team of HUD New Community Development staff members prepared a draft environmental impact statement (*ibid.*).

In September 1971, HUD circulated its draft Environmental Impact Statement ("EIS") for comment (Pet. App. A13). Approximately one month later, after considering a report on the project from the Assistant HUD Secretary for Community Planning Development, the Board of Directors of HUD's Community Development Corporation voted to authorize the Assistant Secretary to make an offer of commitment to guarantee the obligations of the Developer (Pet. App. A29).

On January 20, 1972, HUD issued its "final EIS" on the project, incorporating the written comments of 7 of 13 public agencies whose views had been solicited, and comments volunteered by 9 other agencies or groups (Pet. App. A13).

Accordingly, on February 23, 1972, HUD transmitted an offer of commitment to the Developer, proposing a federal loan guarantee of up to $18 mil-

lion, contingent upon the Developer's agreement, *inter alia*, to a number of conditions concerning protection of the aquifer (Pet. App. A13–A14).[4] On the same date, the petitioners filed their complaint seeking a temporary restraining order and declaratory and injunctive relief prohibiting respondents from issuing or accepting either the bond guarantee or any other federal assistance supporting development of the New Town until the Developer had satisfied the conditions in the offer of commitment and executed a project agreement with HUD[5] (Pet. App. A14).

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[4] These conditions were summarized by the court of appeals as follows (Pet. App. A13–A14): "(1) a moratorium prohibiting development over the recharge zone of the aquifer until completion of a comprehensive environmental study of the recharge zone by the developer and until approval by the HUD Community Development Board and the Texas Water Quality Board of the measures proposed to protect the natural conditions disclosed by the study, (2) review and comment thereon by a public and interagency board organized to the satisfaction of HUD, and (3) the adoption of treatment methods and other continuing measures such as the monitoring of water quality, required by the Community Development Board and the Texas Water Quality Board."

[5] The suit was originally instituted by four citizens' groups, the Sierra Club, Citizens for a Better Environment, League of Women Voters of the San Antonio Area, and American Association of University Women, San Antonio Branch (Pet. App. A9). The Texas Water Quality Board later was permitted to intervene on behalf of the respondents, and the Edwards Underground Water District, together with Bexar County, was permitted to intervene on behalf of the petitioners (*ibid.*).

The Edwards Underground Water District amended its complaint to allege a violation of the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, 33 U.S.C. (Supp. III) 1251 *et seq.* (*ibid.*), but both courts below rejected that contention. Petitioners do not raise this point here.

The district court denied petitioners' motion for a temporary restraining order and granted respondents' motion to hold the case in abeyance until the Developer had complied with the conditions contained in the offer of commitment and executed a project agreement with HUD (Pet. App. A14). Thereafter, in accord with the conditions contained in the offer of commitment, HUD established the San Antonio Water Quality Advisory Review Board, composed of 18 public agencies and Bexar County, to review the impact of the project on the aquifer (*ibid.*). After four public meetings, and a detailed review of all relevant material, the Board approved the project (*ibid.*).

In addition, HUD retained a team of independent geologists who reviewed all aspects of the project and made recommendations for improving environmental controls over the aquifer (Pet. App. A14–A15). The project was again approved by the Texas Water Quality Board (Pet. App. A60), and by the Alamo Area Council of Governments, the San Antonio City Council, Water and Public Service Boards, the State Governor's office and the State Department of Health (Pet. App. A15). Finally, on August 24, 1972, HUD circulated the final EIS and an addendum to 38 public agencies and groups for additional study or comment [6] (*ibid.*).

In October 1972, based on these comments, reports, and recommendations, HUD concluded that the Developer had complied with the conditions of the offer of commitment. Accordingly, HUD proceeded to com-

[6] Attached to the EIS were two appendices consisting of 67 exhibits (Pet. App. A62).

mence negotiations leading to a project agreement (Pet. App. A15). The Developer agreed to a number of additional conditions[7] designed to minimize the impact of the New Town upon the aquifer (Pet. App. A21, A64–A66).[8]

The case proceeded to trial on April 30, 1973. After 9 days of hearings, the district court denied the relief requested by the petitioners and entered judgment for the respondents (Pet. App. A15).

The court of appeals affirmed.[9] The court reasoned that HUD had complied with all procedural and substantive requirements of the National Environmental Policy Act of 1969, 42 U.S.C. 4321–4335 ("NEPA")

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[7] Pursuant to the administration of the Urban Growth and New Community Development Act, *supra*, a trust indenture and development plan are required (Pet. App. A20). These documents are incorporated in the project agreement and are enforceable at law (*ibid.*).

[8] These duties include, *inter alia*, an extensive street sweeping program, the use of a specified minimum level of top soil on all lawns, the use of only a specified type of fertilizer, the use of double tanks for storage of petroleum products, and the use of specialized sewer pipes and an intensive sewer pipe inspection and water monitoring system (Pet. App. A64–A66).

In addition, the plan specified that "[t]he developer shall comply with such further reasonable standards for environmental quality control as the Secretary may prescribe after consultation with other federal agencies pursuant to the National Environmental Policy Act of 1969"; that the Developer must maintain environmental quality control for such additional period of time after completion of development as the Secretary determines to be appropriate; and that HUD will prepare draft and final environmental statements with respect to any subsequent major actions connected with the project (Pet. App. A21).

[9] In two respects, not relevant here, the court of appeals reversed the decision of the district court (Pet. App. A40–A46).

577—880—75——2

(Pet. App. A29–A38). The court noted that HUD's EIS was not a *pro forma* document, that HUD had actually considered the environmental impact of the project prior to making a commitment, and that HUD had permitted a sufficient period of time to lapse between the circulation of the EIS for comments and the decision to make an offer of commitment (Pet. App. A29–A30, A32–A33). The court also ruled that, notwithstanding participation by the Developer in preparation of the EIS, the record adequately supported the district court's conclusion that HUD had actively and independently drafted the statement (Pet. App. A30–A32), and that the EIS adequately considered both the environmental impact of expected "parasite" developments surrounding the New Town and possible alternatives to the project which might have a lesser impact on the environment (Pet. App. A33–A38).

The court also held that the district court's finding that the New Town satisfied all the conditions for a federal government financing guarantee under the Urban Growth and New Community Development Act, 42 U.S.C. 4501–4532 was not clearly erroneous [10] (Pet. App. A22–A23). The court affirmed the district

[10] The findings were (Pet. App. A23):

"(1) The project will provide an alternative to disorderly urban growth;

"(2) It will be economically feasible, in that it will capture more than 15% of the projected growth of Bexar County, because of its wide range of housing amenities and the superior environment;

"(3) It will contribute to the welfare of the entire area, as existing septic tanks will be replaced with storm and sanitary sewers, and as industrial and commercial facilities will be

court's conclusion that, considered as a whole, HUD's decision to provide such a guarantee was not arbitrary, capricious or unlawful (Pet. App. A23–A27).

ARGUMENT

1. a. Petitioners contend (Pet. 13–22) that the EIS failed to consider whether there were alternative sites for the New Town that were located away from the aquifer. The requirement in NEPA (42 U.S.C. 4332 (2) (C)(iii) and (D)) that an agency study and develop alternatives, however, must be "judged against a rule of reason" (Pet App. A36). See *Life of the Land* v. *Brinegar*, 485 F. 2d 460, 472 (C.A.9), certiorari denied 416 U.S. 961; *National Resources Defense Council, Inc.* v. *Morton*, 458 F. 2d 827 (C.A. D.C.). The EIS in the instant case did consider the possibility of locating the New Town away from the aquifer (Pet. App. A97–A98).

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placed in a setting encompassing a broad price range of housing;

"(4) It is consistent with comprehensive physical and social planning;

"(5) It has received all governmental reviews and approvals required by State or local law;

"(6) It will contribute to desirable living conditions in the community, and will be characterized by well balanced and diversified land use patterns, and will include or be served by adequate public, community, and commercial facilities;

"(7) It makes substantial provision for housing within the means of persons of low and moderate income;

"(8) It will make significant use of advances in design and technology with respect to land utilization, materials and methods of construction, and the provision of community facilities and services; and

"(9) A basis of financial, technical, and administrative ability which demonstrates capacity to carry out the program with reasonable assurance of its completion has been shown. *Sierra Club* v. *Lynn*, *supra*, 364 F. Supp. at 839."

That possibility was rejected, however, since approval of a plan at an alternative site would permit haphazard development over the aquifer without benefit of the stringent controls that HUD would impose upon the Developer (see n. 8, *supra*, at 7) and without serving the needs of residents of the northwest quadrant of Bexar County (Pet. App. A54, A98).[11]

HUD was not compelled to consider the possibility that it might finance the building of a new town at an alternative site, since such a project could be undertaken only on lands owned by the federal government utilizing funds made available specifically for the project by Congress, 42 U.S.C. 4524, and upon specific authorization of the President. NEPA does not require an agency to consider alternatives that are remote and speculative. See *Life of the Land* v. *Brinegar, supra; National Resources Defense Council, Inc.* v. *Morton, supra.*[12]

b. Petitioners next contend (Pet. 23–25) that the EIS was deficient because the Developer participated in its preparation. NEPA does not, however, prohibit

[11] The court below held that none of the alternative sites in Bexar County suggested by petitioners met the requirements of the Urban Growth and New Community Development Act (Pet. App. A37).

[12] The decision below as to the adequacy of the consideration of alternatives is not in conflict with *Scenic Hudson Preservation Conference* v. *Federal Power Commission*, 354 F. 2d 608 (C.A. 2), certiorari denied, 384 U.S. 941, as petitioners contend (Pet. 17–18). In that case, there was "no doubt" but that the Commission, as a body designed to regulate public utilities, was under a specific duty pursuant to its organic statute, to "give full consideration to alternative plans." 354 F. 2d at 617. *Cf. Udall* v. *Federal Power Commission*, 387 U.S. 428.

financially interested new community applicants from providing the federal agency with data, information, reports, environmental studies or other assistance in the preparation of an environmental impact statement. See *Iowa Citizens for Environmental Quality, Inc.* v. *Volpe,* 487 F. 2d 849 (C.A. 8); *Citizens Environmental Counsel* v. *Volpe,* 484 F. 2d 870 (C.A. 10), certiorari denied, 416 U.S. 936. NEPA requires only that "the applicable federal agency must bear the responsibility for the ultimate work product designed to satisfy the requirement of section 102(2)(C)." *Life of the Land* v. *Brinegar,* 485 F. 2d 460, 467 (C.A. 9), certiorari denied, 416 U.S. 961. Guidelines promulgated by the Council on Environmental Quality and the Environmental Protection Agency regarding preparation of impact statements contemplate submission of initial environmental information to the agency and permit local and state groups to participate in the statement's preparation (see [redacted], 40 C.F.R. 6.21(c); 40 C.F.R. 1500.7(c))[13] There was no showing in the instant case that HUD had not independently performed its reviewing, analytical and judgmental functions or participated actively and significantly in the drafting process (Pet. App. A60–A63).

c. Petitioners also contend (Pet. 25–26) that the EIS was inadequate because it did not consider the effect of "parasite" developments that the New Town

[13] Although the court in *Conservation Society of Southern Vermont* v. *Secretary of Transportation,* 508 F. 2d 927 (C.A. 2), held that the Federal Highway Administration must prepare the impact statement itself—an issue in regard to which we have sought review in this Court (see our pending petition for a writ of certiorari, *Coleman* v. *Conservation Society of Southern Vermont,*

could be expected to attract around its site. As the court of appeals noted (Pet. App. A34), however, the EIS did in fact recognize that the New Town would tend to attract parasite settlements. The exhibits in the addendum to the EIS disclosed "the expected cumulative impact of the Ranch on population distribution, land use patterns and the financial and economic resources of Bexar County and the surrounding areas" (*ibid.*). As the court of appeals observed, "NEPA does not demand that every federal decision be verified by reduction to mathematical absolutes for insertion into a precise formula" (Pet. App. A34).[14]

d. Petitioners next contend (Pet. 26–28) that HUD violated its own regulations when in October 1971, one month after the draft EIS was issued, the Board of Directors of the Community Development Corpo-

No. 74-1413)—the court recognized that the federal agency nevertheless could "solicit and integrate information from state agencies." 508 F. 2d at 933. There is thus no reason for the Court to hold this case pending disposition of our petition in *Conservation Society*, a copy of which we are serving on counsel for petitioners here. *Greene County Planning Board* v. *Federal Power Commission*, 455 F. 2d 412 (C.A. 2), certiorari denied, 409 U.S. 849, upon which petitioners rely, is a precursor of *Conservation Society* and inapposite for the same reason.

[14] Contrary to petitioners' contention (Pet. 26), the holding of the court of appeals on the question of the "parasite" developments is not in conflict with the decision in *Silva* v. *Lynn*, 482 F. 2d 1282 (C.A. 1), where the court held that the proposed method of solving the drainage problem in areas adjacent to the project was "myopic in the sense of focusing on the project site itself, with no supported judgment" as to what effect the proposed solution would have upon the adjacent areas (482 F. 2d at 1286). As we have noted, however, the EIS in the instant case fully considered the effect of the plan upon adjacent areas.

ration voted to authorize the Assistant Secretary for Community Planning Development to make an offer of commitment to the Developer "at the earliest appropriate time" (Pet. App. A29), and when it extended an offer of commitment on February 23, 1972, contingent upon an "environmental clearance."[15]

As the court of appeals concluded after examining the entire record, however, "[n]on-degradation of the aquifer and ranch environment were paramount considerations throughout the entire HUD review of the Ranch [New Town] application" (Pet. App. A31). Moreover, the offer of commitment was authorized by both the Urban Growth and New Community Development Act (42 U.S.C. 4513, 4514), and by the draft regulations for the implementation of that Act (36 Fed. Reg. 14212–14213 (1971)). Accordingly, neither the October 1971 vote by the Board of Directors of the Community Development Corporation nor the February 1972 contingent extension of an offer of commitment short-circuited the review procedure. Had an environmental clearance not been forthcoming, the offer would have been revoked.

2. Petitioners finally contend (Pet. 28–36) that HUD's commitment to the Developer violates the Urban Growth and New Community Development Act because the New Town does not meet the eligibility requirements contained in that Act and does not promote the goals of that Act. As the court of appeals correctly held, however, the goals enumerated in the

[15] For the conditions contained in the offer of commitment, see n. 4, *supra*. Petitioners contend that environmental clearances should be part of the review process (Pet. 27–28).

Act do not confer judicially enforceable rights. Nor was the district court's finding that the New Town met the eligibility requirements in the Act clearly erroneous.

The legislative history of the Act and HUD regulations thereunder clearly contemplated federal assistance for "[f]ree standing and self-sufficient new communities away from existing urban centers where there is a clear showing of economic feasibility, primarily * * * to accommodate [expected] population growth." See proposed HUD Reg. 32.7(a)(4), 36 Fed. Reg. 14207 (1971). As the court of appeals noted (Pet. App. A24–25), the record demonstrates that HUD conceived of the New Town as an integral element of the entire San Antonio community, providing a viable alternative to disorderly and rapid urban growth in that area. Orderly development would advance the goals of the Act by retarding urban sprawl over the aquifer through implementation of a comprehensive land use plan. The Act does not require the existence of a comprehensive regional land use plan as a condition precedent to federal assistance. See 40 U.S.C. 461. HUD regulations provide only that "[t]he area within which a new community is to be situated must be covered by * * * ongoing planning promulgated or carried on by a duly authorized agency" (see proposed HUD Reg. 32.7(f)(1), 36 Fed. Reg. 14208 (1971)), as occurred in the instant case.[16]

[16] As the court of appeals noted (Pet. App. A27), petitioners did not contend that the Alamo Area Council of Governments was improperly certified by HUD or that it defaulted in its regional planning responsibilities. Petitioners appear to object only to

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.
REX E. LEE,
Assistant Attorney General.
ROBERT E. KOPP,
DAVID M. COHEN,
Attorneys.

JUNE 1975.

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the fact that, in their opinion, the Council did not adequately discharge its responsibilities (*ibid.*). As the court of appeals found, there was no evidence to support such a charge (*ibid.*).

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